[APPELLATE CIVIL JURISDICTION]

TERRELL, J.A. (Malaya), GORDON-SMITH, J. & CUSSEN, J.

May 25, 1940.

J. K. R. LEONARD

(Appellant)

v.

THE OFFICIAL ASSIGNEE

(Respondent).

[SELANGOR CIVIL APPEAL No. 3 of 1939]

Appeal to Privy Council—F.M.S. Appeals Order in Council, 1912—bankruptcy—order of conditional discharge—application by Official Assignee for directions—order made by Court interpreting order of discharge—order confirmed by Court of Appeal—whether judgment of Court of Appeal a final order.

An order of discharge from bankruptcy was made subject to judgment entered against the bankruptcy for $15,000.00. The order concluded as follows:—"And it is also further ordered that the net income of the debtor in excess of $306.00 a month be paid to the Official Assignee until the said judgment has been settled". Upon application by the Official Assignee for directions the Court made an order confirming the interpretation by the Official Assignee of the order of discharge and varied the order by the addition of a proviso. On appeal to the Court of Appeal it was held that in effect the Judge in the lower Court had merely interpreted the former. On application for leave to appeal to the Privy Council.

Held, that as the order of the Court of first instance might be varied at any time either on the application of the debtor under Section 28 (ii) of the Bankruptcy Enactment or on the application of the Official Assignee under Section 85 (i) of the Enactment, the judgment of the Court of Appeal which merely confirmed the order was not a final judgment or order within the rules under the F.M.S. Appeals Order in Council 1912.

Cases referred to:—

(1) *Debtor, In re,* (1939) 1 Ch. 489.

(2) *Ramchand Manjimal v. Goverdhandas Vishindas Ratanchand,* 47 I.A. 124 at p. 127.

(3) *Roberts, In re,* (1904) 2 K.B. 299 at p. 303.

APPLICATION for leave to appeal to the Privy Council.

Ramani for Appellant.

Grattan-Bellew, Deputy Legal Adviser, for Respondent.

Terrell, J.A. (Malaya).—The application is for leave to appeal to His Majesty in Council from the Judgment of the Court of Appeal given on the 12th December, 1939. Under the F.M.S. Appeals Order in Council 1912 an appeal will be—

(a) As of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to, or is of the value of, £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(b) At the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

The first question to decide is whether the judgment of the Court of Appeal is a final judgment.

The order appealed from was made by Gordon-Smith, J. under the Bankruptcy Jurisdiction of the Court upon a motion by the Official Assignee for directions. The question raised by the Official Assignee was the interpretation of the order of discharge of the bankrupt dated the 25th January, 1938. The discharge was granted subject to the bankrupt consenting to judgment being entered against him for $15,000.00 and concluded as follows:—

> "And it is also further ordered that the net income of the debtor in excess of $306.00 a month be paid to the Official Assignee until the said judgment has been settled".

The application for directions under section 78 (iii) of the Enactment came on for hearing before Gordon-Smith, J. on the 25th March, 1939, but no order was made, the Official Assignee being directed to file a separate motion under section 85 (i) of the Enactment to vary the original order.

A further affidavit was filed by the Official Assignee from which it appeared that he had refunded to the bankrupt the sum of $950.00. The present applicant who was one of the creditors argued that upon the original order for discharge this refund was inadmissible.

The motion was heard by Gordon-Smith, J. on the 6th May, 1939, and an order was made the material parts of which are as follows:—

> "IT IS ORDERED that the interpretation by the Official Assignee of the original order dated the 25th day of January, 1938, and his action thereon be confirmed;
>
> AND IT IS ORDERED that in order to make the matter quite clear for the future, the said original order will be varied by the addition of the following words:—
>
> > 'Provided that if the net income of the debtor does not amount to the said sum of $306.00 in any month or months during a calendar year the Official Assignee shall from time to time refund to the debtor such sum or sums out of the balance in his hands arising from the excess so paid to him as aforesaid as will be sufficient to make up such net income to the said sum of $306.00 a month'."

The original order for discharge was therefore varied by the addition of the *proviso*. At the same time the order declared that the interpretation placed upon the order of discharge by the Official Assignee was correct. That being so no variation was strictly required, the *proviso* being merely added *ex abundanti cautela*.

The applicant appealed to the Court of Appeal which dismissed the appeal, holding that in effect Gordon-Smith, J. had merely interpreted the former order. If, however, there was a variation the learned Judge was entitled to make it.

It has been argued that the judgment of the Court of Appeal is final as it finally disposes of the rights of the parties (*Ramchand Manjimal v. Goverdhandas Vishhindas Ratanchand*[2]). The order of the Court of Appeal merely confirmed the order of Gordon-Smith, J. If the order of Gordon-Smith, J. can be varied it would appear to follow that the judgment of the Court of Appeal does not finally dispose of anything except the sum of $950.00 which was refunded by the Official Assignee. This sum is far below the limit of £500 referred to in Rule 2 (a) of the Order in Council.

In the argument before Gordon-Smith, J. it was never suggested that the Court had no power to vary an order for discharge under the provisions of section 85 (i). If there were any doubt on the point it has been settled by the Court of Appeal in England in the case of *In re a Debtor*[1], and the following passages from the judgment of the Master of the Rolls at page 500 may be quoted:—

> "It is admitted that in the order of discharge.... it is competent to the Court to insert a condition.... which will continue to operate after the discharge has become effective. That is conceded. It is also conceded that in a case where that has been done the Court under s. 108 (corresponding to F.M.S. sec. 85) retains its jurisdiction to vary any such condition even though the discharge has become effective...."

> "It could vary such a condition by reducing the amount if it became a hardship on the bankrupt to pay it; similarly if it can do that it must have the power to raise the amount if owing to a change in the bankrupt's circumstances, it is right and proper that he should make a larger payment".

On the appeal to the Court of Appeal it was argued that an application to vary the order of discharge could only be made by the debtor under the provisions of section 28 (ii) of the Enactment, and that the Official Assignee has no *locus standi* in the matter reliance being placed on a *dictum* of the Court in *In re Roberts*[3]. If, however, that case is examined it will be found that the application was originally made by the trustee to sanction a payment by a third party in satisfaction of the balance of the judgment debt. The bankrupt appeared by counsel on the application and the Court decided that the application should be treated as having been made by the bankrupt. These were the circumstances under which the Court decided not also to hear the Trustee. The matter is not referred to in the judgment delivered by the Court and the case is not an authority for the proposition that the Official Assignee cannot apply under section 85 (i) (section 108 (i) of the English Act) under which the powers of the Court according to *Williams* on Bankruptcy, 15th Edition, page 442, are almost without limit. If there is any conflict between *In re Roberts*[3] and *In re a Debtor*[1] I have no hesitation in following the more recent decision. The result is, therefore, the order of Gordon-Smith, J. may be varied at any time either on the application of the debtor under section 28 (ii), or on the application of the Official Assignee under section 85 (i). An order which is liable to be so varied cannot possibly be a final order as it does not finally dispose of the rights of the parties. The judgment of the Court of Appeal merely confirmed the order of Gordon-Smith, J. and its effect would be nugatory if that order were "reviewed, rescinded or varied".

There is no question of "great general or public importance" involved. The application, therefore, must be dismissed with costs.

Gordon-Smith, J.—I concur and having nothing to add

Cussen, J.—I have had the opportunity of reading the Judgment which has been delivered by the Learned President of the Court, and I am in agreement with and concur in that Judgment, and the Order therein.

The Appeal is dismissed with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., TERRELL, J.A. & CUSSEN, J.

June 25, 1940.

MOHAMED RAMLY BIN HAJI RASIP

v.

PUBLIC PROSECUTOR.

[PAHANG MAGISTRATE'S CRIMINAL APPEAL No. 1 of 1940]

Penal Code, Ss. 161, 165—agreeing to accept and accepting illegal gratification—joinder of charges—